Supreme Court, U.S.
FILED
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No. _____

In

The Supreme Court of the United States

October Term, 1995

Willie F. Brown and Doris N. Brown
parents of Sarah J. Brown,

Petitioners-Appellants

V.

Secretary of Health and Human Services,

Respondents

On Petition for Writ of Certiorari
To The United States Court of Federal Claims
Office of the Special Masters

PETITION FOR WRIT OF CERTIORARI

Willie F. and Doris Brown
422 Evangeline Circle
Alexandria, LA 71302
(318) 443-2171

35 pp

IN
THE UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF THE SPECIAL MASTERS

SARAH JANELL BROWN, By Her
Parents and Next Friends,
WILLIE FRED BROWN and DORIS NELL BROWN,

Petitioners,

v.

SECRETARY OF THE
DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

No. 90-3381V
Chief Special Master
Gary J. Golkiewicz

RESPONSE TO PETITIONERS' SECOND SUPPLEMENTAL FILING/ MOTION TO DISMISS

In accordance with the Chief Special Master's Order of December 8, 1993, respondent herein responds to petitioners' supplemental filing of November 18, 1994, and herein requests that this petition be dismissed.[1]

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[1]In making this response respondent does not waive any defense, and reserves all defenses that may be available at some later time. Further, respondent reserves the right to make any objections, including those relating to the Court's jurisdiction, and to request additional records should future proceedings occur.

DISCUSS ION

On March 10, 1994, respondent requested that petitioners provide supplemental documentation in order to permit a thorough medical evaluation of their claim. See Preliminary Review/Request for Records at 2-3. On May 10, 1994, petitioners filed additional records which contained some of this information. See Pet. Supp., May 10, 1994. Therefore, on June 9, 1994, respondent renewed her request that petitioners provide additional records prior to any determination of entitlement under the Vaccine Act .[2]

On November 18, 1994, petitioners satisfied respondent's outstanding requests. See Pet. Supp., Nov. 18, 1994. However, petitioners also stated that their "Unreimbursed medical expenses does not exceed $1,000.00." Pet. Supp., Nov. 18, 1994, Exh. 5 (emphasis added).

It is beyond dispute that the Vaccine Act requires petitioners to provide documentation

> ...demonstrating that the person who suffered such injury...incurred unreimbursed expenses due in whole or in part to such illness, disability, injury, or condition, in an amount greater than $1,000..."

42 U.S.C.A § 300aa-1 1(c) (l) (D) (emphasis added). Congress has similarly made clear that compensation is limited "to cases in which a person...incurs unreimbursable medical expenses of more than $1000...". H.R. Rep. No. 391, 100th Cong., 1st Session 690 (1987) (emphasis added). Here, petitioners plainly

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[2]Specifically, respondent renewed her request that petitioners provide complete records Speech and Occupational/ Physical Therapy records, the complete records from Dr. Michael Manuel and the M. D. Haynes School, and any information related to petitioners' prior civil action against Dr. C. V. Reddy. Resp. to Pet. Supp. at 2 n.3.

are unable to satisfy this statutory requirement of the Vaccine Act. As such, their claim for compensation must be dismissed.

CONCLUSION

Because this petition cannot satisfy the statutory requirements of the Vaccine Act, it must be dismissed.

Respectfully submitted,

FRANK W. HUNGER
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Dated: December 19, 1994

App.4

IN

THE UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF THE SPECIAL MASTERS
No. 90-3381V

SARAH JANELL BROWN, By Her
Parents and Next Friends,
WILLIE FRED BROWN and DORIS NELL BROWN,

Petitioners,

v.

SECRETARY OF THE
DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

Filed June 30, 1995
NOT TO BE PUBLISHED

Donna S. Cummings, New Orleans, Louisiana, for petitioners.

Althea E. Walker, U.S. Department of Justice, Washington, D.C., for respondent.

ORDER OF DISMISSAL

This matter is before me on respondent's motion to dismiss filed May 25, 1995. Respondent argues that petitioners violated § Il(a)(6) of the Vaccine Act by filing a civil action for damages after November 15, 1988, for a vaccine-related injury stemming from the administration of a vaccine before November 15, 1988. Motion to Dismiss at 2. Both that civil claim and this Program petition are based on

the same factual predicate.

On June 19, 1995, the undersigned ordered petitioners to show cause why this claim should not be dismissed. Petitioners responded to the show cause order on June 26, 1995. ("Resp."). Petitioners concede that they filed a civil action on January 17, 1989, by sending a letter to the Louisiana Commissioner of Insurance. Resp. at 1. As petitioners note, "Under the Louisiana Medical Malpractice Act, the claim is commenced by the filing of a letter with the Commissioner of Insurance, and the suit filed in Court is merely a step in the prosecution of that original claim." Id. at 1-2.

Petitioners suggest they complied with the jurisdictional limitations of § ll(a)(5) by dismissing the claim on October 1, 1990, before judgment. Id. at 2. However, even assuming arguendo that petitioners complied with § ll(a)(5),[1] they also must comply with § ll(a)(6). Salceda v. Secretary of HHS, 30 Fed. C1. 316, 319 n.2 (1994), on remand, 1994 WL 139375 (Fed. C1. Spec. Mstr. Apr. 6, 1994), aff'd, 33 Fed. C1. 164 (1995), appeal docketed, No. 95-5078V (Fed. Cir. Mar. 29, 1995); see also Hoffman v. Secretary of HHS, 1995 WL 103334 (Fed. C1. Spec. Mstr. Feb. 21, 1995) (dismissing claim based on § ll(a)(6); Fournier v. Secretary of HHS, 1991 WL 239108 (C1. Ct. Spec. Mstr. Oct. 29, 1991) (same). Simply because petitioners complied with one jurisdictional provision does not relieve them of a duty to comply with all the Act's jurisdictional requirements.

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[1] This point is arguable because the civil claim was dismissed on the same day that petitioners filed their Program petition. Resp. at 2.

Section 11(a)(6) states:

> If a person brings a civil action after November 15, 1988 for damages for a vaccine-related injury or death associated with the administration of a vaccine before November 15, 1988, such person may not file a petition under subsection (b) of this section [the Program] for such injury or death.

As the alleged vaccine-related injury at issue here apparently occurred immediately after the administration of a vaccination on January 17, 1986, § 11(a)(6) is clearly applicable. Petitioners admit in their response that a civil action for damages related to this alleged vaccine-related injury was filed after November 15, 1988. Resp. at 1. The civil action was filed against the administrator of the vaccine in question because he allegedly "deviated from the standard of care" by giving the immunizations. P. Ex. 4 at 2. The civil action sought "damages in sums appropriate in the circumstances." Id. This clearly constitutes the type of civil action for damages contemplated by § 11(a)(6).

Petitioners suggest further that the undersigned should not dismiss this claim because the state court action was "likely" barred by the statute of limitations when filed. Resp. at 2. This point is irrelevant. Section 11(a)(6) does not address the likelihood of success of the prior civil action. The only relevant question is whether petitioners actually filed a civil action for damages for the alleged vaccine injury after November 15, 1988. The fact that the claim was filed ends the inquiry.

Petitioners' final legal argument, that one of the injured party's parents was never a party to any civil action related to this alleged vaccine injury and should be allowed to

pursue this Program petition, has been addressed previously. In Salceda, Judge Andewelt of the U.S. Court of Federal Claims held that it does not matter whether the civil action was brought on behalf of the injured minor by a different guardian than the guardian bringing the Program petition. Salceda, 30 Fed. C1. at 319. "The focus of Section ll(a)(6) is on the 'person' who sustained the vaccinerelated injury or death and not on the individual who happens to represent the interests of that person in the litigation." Id. (citing Benedict v. Secretary of HHS, 29 Fed. C1. 587, 591 (1993); Head v. Secretary of HHS, 26 C1. Ct. 546, 550 (1992), aff'd, 996 F.2d 318 (Fed. Cir. 1993). I concur. The Vaccine Act represents a limited waiver of sovereign immunity which must be strictly construed when dealing with matters of jurisdiction. McGowan v. Secretary of HHS, 31 Fed. C1. 734, 740 (1994). Ms. Brown cannot proceed with this claim even though she was not a party to the previous civil action.

CONCLUSION

After considering the record herein, I find this claim is barred by § ll(a)(6) because a civil action for damages was filed against the vaccine administrator on behalf of Sarah Janell Brown after November 15, 1988, for an injury that occurred before that date. In light of the above, this claim is hereby DISMISSED. In the absence of a motion for review filed pursuant to RCFC Appendix J, the Clerk of the Court is hereby directed to enter judgment in accordance with this order.[2]

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[2] The parties may expedite entry of judgment by filing notices renouncing their right to seek review of this dismissal.

IT IS SO ORDERED.

Elizabeth E. Wright
Special Master

IN
THE UNITED STATES COURT OF FEDERAL CLAIMS
No. 90-3381V

SARAH JANELL BROWN, By Her
Parents and Next Friends,
WILLIE FRED BROWN and DORIS NELL BROWN,

Petitioners,

v.

SECRETARY OF THE
DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

Special Master Wright
Judge James F. Merow

RESPONSE TO PETITIONERS' MOTION FOR REVIEW

Pursuant to Appendix J. RCFC, this memorandum responds to petitioners, Motion for Review filed July 31, 1995. Petitioners appeal the June 30, 1995 order of the special master dismissing their petition under the National Vaccine Injury Compensation Program ("Vaccine Program" or " Act ") for alleged vaccine-related injuries sustained by their daughter, Sarah Janell Brown. See 42 U.S.C. §§ 300aa-10 to 34-(1988 & Supp. V 1994).[1]

[1] Hereinafter, for the ease of citation, all references will refer to the relevant subsection of the current amended version of 42 U.S.C. § 300aa.

For the reasons set forth in this memorandum, the special master's dismissal should be affirmed.

I. STATEMENT OF THE CASE

Sarah Janell Brown ("Sarah") received her first DTP/ polio vaccination at the office of her pediatrician, Dr. C. V. Reddy on January 17, 1986. Petition. at ¶3 ("Pet"); Petition Exhibit 2 ("Pet. Ex."). On February 24, 1986, Sarah was hospitalized after her parents found her "jerking and spitting up." Pet. Ex. 6.

Sarah was discharged two days later with a diagnosis of seizure disorder. Id.

II. PROCEDURAL HISTORY

Pursuant to the Louisiana Medical Malpractice Act, Willie Fred Brown ("Mr. Brown") filed a certified letter with the Commissioner of Insurance on January 17, 1989, requesting review of his claim for damages resulting from the alleged negligent treatment rendered to his infant daughter, Sarah, by Dr. Reddy. Petitioners, Response to Special Master's Show Cause Order of June 19, 1995 at 1 ("Resp. to Show Cause Order"). On May 25, 1990, Mr. Brown formally filed a civil action against Dr. Reddy in the Ninth Judicial District Court for the Parish of Rapides, State of Louisiana. Petitioners' Response to Respondent's Response to Petitioners' Supplemental Filing, Ex. 4 ("Pets.' Resp. to Resp. to Suppl. Filing"). In his civil action, Mr. Brown alleged that Dr. Reddy "deviated from the standard of care" and that, as a result, Sarah suffered injuries for which he was seeking compensation. Id. Mr. Brown subsequently filed a motion to dismiss his action against Dr. Reddy so that he and his wife, Doris Nell Brown, could pursue compensation under the

National Childhood Vaccine Injury Act. On October 1, 1990, the motion to dismiss was granted by the Ninth Judicial District Court. Resp. to Show Cause Order, Ex. 2. Petitioners filed their petition for compensation that same day.

On May 25, 1995, respondent moved to dismiss petitioners' petition. See Respondent's Report/Motion to Dismiss at p. 2 ("Mot. to Dism."). Respondent alleged that since Sarah had received a vaccine before November 15, 1988 and petitioners had brought a civil action against Dr. Reddy after November 15, 1988, petitioners had violated section 11(a)(6) of the Act. Id. at 2-3. On June 19, 1995, the special master issued an order requiring petitioners to show cause why their petition should not be dismissed because a civil action had apparently been filed "well after the congressionally-mandated cut-off date of November 1, 1988." Order to Show Cause at 1 (citation omitted).

On or about June 26, 1995, petitioners filed their response to the special master's order to show cause. See Resp. to Show Cause Order. Petitioners admitted that the medical malpractice claim was actually commenced on January 17, 1989 and that the civil action filed in the Ninth District Judicial Court was "merely a step in the prosecution of that original claim." Id. at 1-2. Petitioners suggested that they complied with section 11(a)(5) by dismissing their claim on October 1, 1990 before judgement was issued. Id. at 1. They claimed that their medical malpractice claim and subsequent civil action "were in all likelihood barred by the Louisiana Statute of limitations" and that "[f]or these reasons alone, this claim should not be dismissed, but should be considered on the merits." Id. at 2. Finally, petitioners maintained that Doris Nell Brown ("Mrs. Brown") was never a party to the civil action filed against Dr. Reddy and therefore was not bound by section 11(a)(6). According to petitioners, Mrs. Brown "has taken no action whatsoever

related to this vaccine-related injury" other than to file the instant petition for compensation under the Vaccine Program.

On June 30, 1995, the special master dismissed petitioners' petition. Brown v. Secretary, HHS, No. 90-3381V, slip op. (Fed. C1. Spec. Mstr. June 30, 1995) ("Dismissal Order"). In their reply to her Order to Show Cause, petitioners had admitted to filing a civil action after November 15, 1988, against the vaccine administrator for damages related to an alleged vaccine-related injury. Dismissal Order at 1. The special master noted that "[b]oth [the] civil claim and the Program petition are based on the same factual predicate." Id. Given that petitioners were claiming an injury as the result of a vaccination administered on January 17, 1986, the special master found section 11(a)(6) to be clearly applicable. Id. at 2. The special master noted that, even assuming for the sake of argument that petitioners complied with section 11(a)(5) by dismissing their claim before judgment, petitioners were still required to comply with section 11(a)(6). Id. at 1-2. Finally, in response to petitioners, argument that Mrs. Brown was not barred from pursuing the vaccine petition, the special master, citing Salceda v. Secretary, HHS, 30 Fed. C1. 316 (1994) (order remanding to special master for clarification), noted that it did not matter whether the civil action was brought on behalf of the injured minor by a different guardian than the guardian bringing the Program petition.[2] Rather, the focus of

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[2] On remand, the special master in Salceda dismissed the claim for violation of section 11(a)(6), holding that the injured minor was the real party in interest. Salceda, 1994 WL 139375 (Fed. C1. Spec. Mstr. Apr. 6, 1994). Petitioner appealed this dismissal on other grounds and the special master was affirmed. See Salceda v. Secretary, HHS, 33 Fed. C1. 164 (1995), appeal docketed, No. 95-5078 (Fed. Cir. April 4, 1995).

section 11(a)(6) is the person who sustained the vaccine-related injury, not the person who happens to represent that person's interests. Dismissal Order at 3.

Petitioners filed a Motion for Review of the special master's decision on July 31, 1995, maintaining that the special master had erred, as a matter of law, in interpreting and applying section 11(a)(6).

III. 8TANDARD OF REVIEW

Under the Vaccine Act, a special master's decision may not be disturbed unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 42 U.S.C. § 300aa-12(e)(2)(B); Munn v. Secretary, HHS, 970 F.2d 863, 869 (Fed. Cir. 1992). Errors of law are reviewed under the "not in accordance with the law" standard. Hossack v. Secretary, HHS, 32 Fed. C1. 769 (1995); Munn, 907 F.2d at 870. Whether Doris Nell Brown is barred by section 11(a)(6) from pursuing a petition under the Vaccine Act for injuries to Sarah Brown is principally a question of law.

IV. ARGUMENT

The Special Master Properly Determined That Petitioners' Civil Action Was Barred By Section 11(a)(6) Of The Vaccine Act.

Section 11(a)(6) of the Vaccine Act plainly states the relevant gatekeeping provision with respect to cases involving civil actions filed after November 15, 1988 for vaccines administered prior to November 15, 1988.

> If a person brings a civil action after November 15, 1988 for damages for a vaccine-related injury

> or death associated with the administration of a vaccine before November 15, 1988, such person may not file a petition under [the Program] for such injury or death.

As a limited waiver of sovereign immunity, the Vaccine Act is to be strictly construed. McGowan v. Secretary, HHS, 31 Fed. C1. 734, 740 (1994) (citations omitted). Here, petitioners ask that the court ignore the plain language of the statute and reverse the special master. The relevant facts are crystal clear. In the instant case, Sarah Brown, the alleged vaccine-injured child, received a DPT vaccination on January 17, 1986. Pet. Ex. 2. Petitioners, specifically Willie Fred Brown, commenced a civil action against Dr. C. V. Reddy, the administrator of the vaccine, on January 17, 1989 seeking compensation for injuries Sarah allegedly suffered as the result of Dr. Reddy's negligence in the administration of the vaccination. Resp. to Show Cause Order at 1. Clearly, these facts fall squarely within the purview of section 11(a)(6). Accordingly, the special master properly dismissed the petition.

Petitioners offer no support for a contrary interpretation of section 11(a)(6). They simply argue that Doris Brown is not a "person" who filed a civil action after November 15, 1988, and, consequently, she is not barred as a petitioner under the Act. Rather her husband Willie Fred Brown filed the action against Dr. Reddy; therefore, he is the only "person" who is barred. Under the interpretation urged by petitioners, anyone may file a civil action after November 15, 1988 on behalf of a child who received a vaccine before that date and who is allegedly injured by the vaccine, as long as that person dismisses the action prior to another party filing a petition under the Act. This tortured interpretation further ignores the plain language of the Act.

Subsection 11(a)(9) defines the "persons" who are subject to subsection 11(a): "This subsection applies only to a person who has sustained a vaccine-related injury or death and who is qualified to file a petition for compensation under the Program. " See also Head v. Secretary, HHS, 26, C1. Ct. 546, 550-51 (1992), aff'd, 996 F.2d 318 (Fed. Cir. 1993). Thus, the "person" referred to in section 11(a)(6) is the person who sustained the alleged vaccine-related injury, not the person who represents the interests of that injured person. Furthermore, this court has addressed this very issue on a number of occasions with regard to "persons covered by the language of section 11(a). See Salceda, 30 Fed. C1. at 319 (the focus of section 11(a)(6) is on the person who sustained the vaccine-related injury, not on the individuals who happen to represent the interests of that person); Benedict v. Secretary, HHS, 29 Fed. C1. 587. 591 (1993) (section 11(a)(6) only requires the interests of the vaccine injured person be represented in both the earlier civil action and the vaccine petition; the identity of the person representing such interests is irrelevant); Head, 26 Fed. C1. at 550-51 (in applying section ll(a)(7), instead of focusing on the identity of the legal representative, the "person who brought the action" should be interpreted to refer to the person who suffered the vaccine-related injury). Without fail, this court has found that the focus of section 11(a), particularly 11(a)(6), is on the interests of the injured person who is the subject of the various legal actions, not on the identity of the parties representing the injured person. "To hold otherwise would render §11(a)(6) meaningless, as it could be easily circumvented simply by supplying a different representative in each case for an injured person." Benedict, 29 Fed. C1. at 591.

Petitioners also argue that the dismissal of the civil action before judgment and before filing their vaccine petition was in keeping with the "focus" of section 11(a)(6),

which is to prevent individuals who have been awarded damages in a civil action from depleting the funds available under the Act. Under the Act,

> [f]or situations where the vaccine was administered prior to November 15, 1988, Congress gives the vaccine recipient a choice between bringing a civil suit instead of filing a petition under the Vaccine Act. Congress provides, however, that if the vaccine recipient chooses to bring a civil suit, the recipient cannot thereafter seek compensation under the Vaccine Act. The wording of Section 11(a)(6) in this regard is unambiguous. If the vaccine recipient files a civil suit after November 15, 1988, he or she 'may not file a petition [under the Vaccine Act]., Section 11(a)(6) does not allow for any exception, even where the vaccine recipient was unaware of the requirements of the Vaccine Act or of the repercussions of filing a civil action against the vaccine manufacturer or administrator.

Salceda, 33 Fed. C1. at 166 (emphasis added). In this case, petitioners cannot retroactively comply with the requirements of section 11(a)(6) simply by dismissing their civil action prior to filing a vaccine petition. [3] Petitioners had a choice between filing a vaccine petition or filing a civil action. Once they filed an action against Dr. Reddy, they effectively chose the means by which they would seek recovery for the alleged injuries to Sarah. Clearly, in this case, section 11(a)(6) prevents the pursuit of a vaccine petition, whether or not

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[3] Petitioners actually filed their vaccine petition on the same day on which the civil action was dismissed.

petitioners dismissed the post-November 15, 1988 civil action before filing their vaccine petition or whether their civil action was time-barred in the state courts. Section 11(a)(6) makes no exceptions.

CONCLUSION

For the reasons stated above, because the special master's dismissal of petitioners' claim was in accordance with law, her decision should be affirmed.

Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney General

HELENE M. GOLDBERG
Director
Torts Branch, Civil Division

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Dated: 8/29/95

IN
THE UNITED STATES COURT OF FEDERAL CLAIMS
No. 90-3381V

SARAH JANELL BROWN, By Her
Parents and Next Friends,
WILLIE FRED BROWN and DORIS NELL BROWN,

Petitioners,

v.

SECRETARY OF THE
DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

JUDGEMENT
Filed December 19, 1995

Pursuant to the court's opinion of December 19., 1995, affirming the special master's June 30, 1995 decision,

IT IS ORDERED AND ADJUDGED this date, pursuant to Appendix J ¶30, that the petition is dismissed. No costs.

David A. Lampen
Clerk of Court

December 26, 1995 By: Amelia C. Simmons
Deputy Clerk

NOTE: As to election, 90 days from this date or the issuance of the appellate court's mandate, see Appendix J ¶33.

As to attorneys' fees and costs, within 21 days of the above election, see Appendix J ¶12.

As to petition for review, 60 days from this date, see Appendix J ¶32. Petition for review and filing fee of $100.00 should be mailed to the following address: Clerk, U. S. Court of Appeals for the Federal Circuit, 717 Madison Place NW, Washington, DC 20439.

IN
THE UNITED STATES COURT OF FEDERAL CLAIMS
No. 90-3381V
Filed December 19, 1995

SARAH JANELL BROWN, By Her
Parents and Next Friends,
WILLIE FRED BROWN and DORIS NELL BROWN,

Petitioners,

v.

SECRETARY OF THE
DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

Vaccine Act;
Prior Civil Action, (Section 11(a)(6)).

Donna S. Cummings, New Orleans, Louisiana, attorney for petitioners.

Althea E. Walker, Washington, D.C., with whom was *Assistant Attorney General Frank W. Hunger*, for respondent.

OPINION

MEROW, Judge.

Introduction

This matter comes before the Court on Petitioners' Motion for Review of Special Master Elizabeth E. Wright's

June 30, 1995 order dismissing their petition for compensation under § 300aa-1 l(a)(6) of the National Vaccine Injury Compensation Act ("Vaccine Act" or "Act"), 42 U.S.C. § 300aa-10-34 (1988 & Supp. V 1993).[1] For the reasons set forth below, the special master's decision is affirmed.

Background

Sarah Janell Brown, ("Sarah") received a DTP/polio vaccination on January 17, 1986. Pet. at ¶ 3, Ex. 2. In February, 1986, over a month after the administration of the vaccine, Sarah experienced episodes of "jerking and spitting up." Pet. at ¶3. Sarah was hospitalized, and subsequently diagnosed with seizure disorder. *Id.* at ¶ 4; Ex. 6.

Sarah's father, Willie Fred Brown, brought a civil action in Louisiana state court on May 25, 1990 against the physician who administered Sarah's DTP vaccine for injuries allegedly resulting from the immunization. Pet's Resp. to Show Cause Ord. at 1-2. On October 1, 1990, prior to the entry of judgment, Petitioners had their civil action dismissed. *Id.* at 2.

Sarah's parents ("Petitioners") brought the instant petition for compensation under the Vaccine Act on October 1, 1990, the very day of Petitioners' dismissal of the Louisiana civil action. Respondent moved to dismiss for lack of jurisdiction, alleging that Petitioners had failed to satisfy the requirements of § ll(a)(6). Special Master Wright found jurisdiction lacking and entered an order of dismissal on June 30, 1995. On July 31, 1995, Petitioners filed their motion for

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[1] When discussed within the text, Vaccine Act sections will be referenced without the preceding title number or "300aa."

review in the United States Court of Federal Claims.

Discussion

The facts of this case are undisputed, therefore the Court only reviews the special master's legal conclusion that Petitioners are precluded from bringing their Vaccine Act petition for lack of jurisdiction under § 1 l(a)(6). This Court may set aside a special master's findings of fact and conclusions of law which are found to be ". . . arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 300aa-12(e)(2). Each of these standards applies to a different aspect of a judgment - fact findings are reviewed under the "arbitrary and capricious" standard, legal questions under the "not in accordance with law" standard, and discretionary rulings under the "abuse of discretion" standard. *Munn v. Sec'y of DHHS,* 970 F.2d 863, 870 n.2 (Fed. Cir. 1992); *cf. Euken v. Sec'y of DHHS,* 34 F.3d 1045, 1047 (Fed. Cir. 1994) (not in accordance with law standard is a *de novo* standard of review).

In matters of statutory interpretation, the judiciary is required to carry out the will of the legislature by discerning, if possible, the legislative intent with respect to the issue presented. Under the traditional rule, courts must first look to intrinsic evidence of intent - the textual language alone. *E.g. Toibb v. Radloff,* 501 U.S. 157, 161-63, 111 S. Ct. 2197, 2200, 115 L. Ed. 2d 145 (1991) *cited in Weddel v. Sec'y of HHS,* 23 F.3d 388, 391 (Fed. Cir. 1994). To ascertain the import of one particular provision of a complex regulatory statute such as the Vaccine Act, a court must consider the text of the statute as a whole. *Amendola v. Sec'y of HHS,* 989 F.2d 1180, 1182 (Fed. Cir. 1993). If upon review it is clear "what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were

used," *Weddel*, 23 F.3d at 391 (*quoting* Oliver Wendell Holmes, The Theory of Legal Interpretation, 12 Harv. L. Rev. 417, 417-419 (1899), this meaning must be enforced despite extrinsic evidence of a contrary intent. *Wisconsin R.R. Comm'n v. Chicago, Burlington & Quincy R.R.*, 257 U.S. 563, 589, 42 S. Ct. 232, 237-38, 66 L. Ed. 371 (1922), cited in *Weddel*, 23 F.3d at 391.

When construing unambiguous statutory text, courts may depart from plain language only in rare cases in which application of a statute produces a result that is not just harsh or troubling, but rather, when it is so "bizarre" that Congress could not be said to have intended it. See *Demarest v. Manspeaker*, 498 U.S. 184, 186, 190-91, 111 S. Ct. 599, 604, 112 L. Ed. 2d 608 (1991) *cited in Weddel*, 23 F.3d at 391. In any case, to support a construction that is contrary to a statute's plain meaning, a litigant must set forth explicit legislative history to that effect. *Massing v. Sec'y of HHS*, 926 F.2d 1133, 1135 (Fed. Cir. 1991) (utilizing this rule in analysis of Vaccine Act provision).

Further coloring the statutory construction in this matter is the basic rule that " [l]imitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Soriano v. United States*, 352 U.S. 270, 276, 77 S. Ct. 269, 273, 1 L. Ed. 2d 306 (1957); *Schumacker v. Sec'y of HHS*, 2 F.3d 1128, 1135 n.12 (sovereign immunity's constraints discussed in context of Vaccine Act review).

With these tools of construction in hand we turn to the Vaccine Act provision upon which the special master relied. Section 11(a)(6) provides:

> If a person brings a civil action after November 15, 1988 for damages for a vaccine-related injury

> or death associated with the administration of a vaccine before November 15, 1988, such person may not file a petition under subsection (b) [Vaccine Program] of this section for such injury or death.

42 U.S.C. § 300aa-ll(a)(6). Special Master Wright determined that § 11(a)(6) barred Petitioners' claim because the injury at issue occurred in 1986 and Petitioners had filed a civil action in 1989 for damages related to the allegedly vaccine-related injury. The special master noted that Petitioners' civil action "clearly constitute[d] the type of civil action for damages contemplated by § 11(a)(6)," because it was an action for damages brought against a vaccine administrator alleging that administration of the vaccine constituted a deviation from the standard of care. Order of Dismissal at 2.

In their motion for review, Petitioners challenge this finding on two bases. First, they assert that jurisdiction obtains under the Act because both of Sarah's parents brought the instant petition, while the prior civil action was filed solely under the name of "Willie Fred Brown," Sarah's father. They contend that § ll(a)(6) only precludes petitions which name the same "person" who served as the vaccine-injured individual's representative or guardian in the earlier civil case. Second, as an alternate basis for jurisdiction, Petitioners point out that they dismissed their civil action prior to a final disposition and, as such, never received compensation for Sarah's injury. Mot. for Review at 1-2. They assert that

> the "focus" of the Act's refusal to permit claims by those who have filed civil actions after November 15, 1988 is to prevent double recovery, so that persons who have recovered

> in a civil action will not deplete the funds available under the Act.

Id. at 3. Implicit in their argument is that the jurisdictional limitations established by § 11(a)(6) were not intended to leave parties - such as Petitioners - who err in making initial forum selections without any recourse whatsoever. *Id.* at 3.

A. Petitioners' first contention - that Sarah's mother's joining as a guardian in Sarah's petition somehow distinguishes the identity of the "person" who filed the civil action from that of the person filing the instant petition - lacks merit. The Court of Federal Claims has rejected similar arguments repeatedly. *See Salceda v. Sec'y of HHS*, 30 Fed. Cl. 316, 319 (1994), *on remand*, 33 Fed. Cl. 164, 165 (1995), *aff'd* No. 95-5078, slip op. at 2-3, (Fed. Cir. Nov. 28, 1995) (mother of injured child brought Vaccine Act petition, while both mother and father brought civil action as plaintiffs and applied for; status as guardians ad litem); *Benedict v. Sec'y of HHS*, 29 Fed. Cl. 587, 590 (1993) (§ 11(a)(6) bar invoked when parents brought civil action and conservator of child's estate brought Vaccine Act petition).

Vaccine Act § 11(a)(9) defines the term "person" with relation to the Act's jurisdictional provisions as the individual "who has sustained a vaccine-related injury or death." *Salceda*, 30 Fed. Cl. at 319. Thus, when interpreting § 11(a)(6), "the identity of the person representing the interest at hand is irrelevant." *Benedict*, 29 Fed. Cl. at 591. When parties file a civil suit subsequent to November 15, 1988 concerning the same individual as a Vaccine Act petition, the Act will bar the petition regardless of a lack of identity of persons representing such individual. *Id.* Accordingly, pursuant to the Vaccine Act, the person considered as filing the instant Vaccine Act petition as well as the earlier civil suit is Sarah, and not her mother or her father. Therefore, §

ll(a)(63) precludes jurisdiction over the instant case in this regard.

B. In their second argument based upon the focus of the Act, Petitioners ask this Court to fulfill the Congressional goal of providing an opportunity for compensation to all vaccine-injured individuals - even if that requires bypassing the plain language of the text. Asserting that the intent of § ll(a)(6) was merely to prevent double recovery, Petitioners apparently contend that barring jurisdiction under this provision produces a bizarre result.

As stated above, the language of the text must be followed as long as it is not ambiguous. *Supra* at 3. Again, § ll(a)(6) states,

> If a person brings a civil action after November 15, 1988 for damages for a vaccine-related injury or death associated with the administration of a vaccine before November 15, 1988, such person may not file a petition under subsection (b) [Vaccine Program] of this section for such injury or death.

42 U.S.C. § 300aa-11(a)(6) (emphasis added). It has been held consistently that the text of § 11(a)(6) is clear. *See e.g. Salceda,* 33 Fed. Cl. at 166; *Lamb by Lamb v. Sec'y of HHS,* 24 C1. Ct. 255, 257 (1991); *Joy v. Sec'y of HHS,* 1990 WL 299398 at 1-2 (C1. Ct. Spec. Mstr. Nov. 16, 1990). The wording of the provision is straightforward. Without qualifying language, the provision mandates that no one who "brings a civil action" may file a Vaccine Act petition. *Lamb,* 24 C1. Ct. at 258 (generally accepted rule is that "filing" a complaint is equivalent to "bringing" or "commencing" an action). Use of the present tense of the verb "bring" excludes all petitioners who ever commence a civil action either before

or after filing a Vaccine Act petition. *See Salceda*, 30 Fed. C1. at 319 n.2; *but see Klahn v. Sec'y of HHS*, 31 Fed. C1. 382 (1994) (petitioner who filed a civil action subsequent to filing a Vaccine Act petition was not jurisdictionally barred). Further, use of the sweeping command "may not file" precludes arguments that Congress intended that filing a Vaccine Act petition would be permitted under any condition after a post-November 15, 1988 civil action had been commenced.

Also, upon review of the other jurisdictional provisions of the Act, it becomes apparent that Congress intended to place various jurisdictional limitations within the compensation system. Section 11 of the statute divides possible petitioners into three classes: class (1) being those injured prior to November 15, 1988 who brought civil actions prior to that date; class (2) being those injured prior to November 15, 1988 who had not brought civil actions prior to that date (including Petitioners); and class (3) being those injured subsequent to November 15, 1988. Those in the first class enjoy the benefit of either dismissing their civil action (within two years) and proceeding under the Vaccine Act, or maintaining their civil action and foregoing Vaccine Act review. See 42 U.S.C. § 300aa11(a)(5)(A). Those in the second class may either file a civil action or proceed under the Vaccine Act, but cannot do both. 42 U.S.C. § 300aa-ll(a)(6). Petitioners in the third class are required by the statute to bring Vaccine Act petitions for recovery of "an amount greater than $1000 or in an unspecified amount" prior to entering the civil system. *See* 42 U.S.C. § 300aa-ll(a)(2)(A). They have no option to elect to bring a civil action instead of a Vaccine Act petition.[2] *Id.*

The disparate treatment of the three classes is evident. Petitioners in the first and third classes are permitted to bring Vaccine Act proceedings subsequent to dismissal of a

previous civil suit, whereas class two petitioners are denied this privilege.[3] *See Flowers v. Sec'y of HHS*, 49 F.3d 1558, 1562 (Fed. Cir. 1995) (post1988 injured petitioner improperly files civil suit and is allowed to refile Vaccine Act petition); *but see Salceda*, 30 Fed. C1. at 319 n.2. Petitioners in class two may elect to bring either a civil action or a Vaccine Act petition - but choosing the former precludes any possibility of ever bringing a Vaccine Act petition. *See Salceda* 30 Fed. Cl at 319.

At first blush, the restriction placed upon class two petitioners may appear harsh as it provides no second chance for a petitioner who makes a hasty or illinformed decision to bring a civil action either prior to or concurrently with a Vaccine Act petition. *See e.g. Lamb*, 24 C1. Ct. at 258 (claimed incompetence of counsel resulted in petitioner being

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[2] Additionally, members of all three classes retain the right to commence civil actions subsequent to the conclusion of Vaccine Act review in the event they are unsatisfied with their recovery. See 42 U.S.C. § 300aa-21 (a). Further, the Act provides a mechanism for tolling state statutes of limitations during the pendency of Vaccine Act review. 42 U.S.C. § 300aa-16(c).

[3] Again, members of the first class must also satisfy § 11(a)(5)(A).

unaware of the availability of Vaccine Act relief at time of filing civil action). However, consideration of the statute in its entirety reveals that Congress intentionally and rationally placed this restriction upon class two petitioners.

Individuals in class one who had filed civil actions before November 15, 1988 had no option to pursue a remedy under the Vaccine Act when they filed their actions. With § 11(a)(5)(A) Congress provided them an opportunity to dismiss their civil suits and proceed under the Vaccine Act. In contrast, class two petitioners had not yet initiated their civil actions at the time Congress enacted the Act. With § 11(a)(6) Congress permitted these petitioners to proceed with civil actions as they would have in the statutory environment extant on the date of injury, but pursuit of such actions would foreclose the possibility of a Vaccine Act action. *Greider v. Sec'y of HHS*, 23 Cl. Ct. 348, 351 (1991). By providing this disincentive to bringing prior civil actions, Congress encouraged class two petitioners to proceed first under the Act.[4] *Id.* With respect to class three individuals who were injured subsequent to the Act, Congress uncovered a clean slate and made initial Vaccine Act proceedings mandatory. When viewed in this way, the systematic and logical nature of the Act's jurisdictional provisions is manifest.

Additional evidence of Congressional intent to impose a jurisdictional choice restriction can be found in § 10(b) of the Vaccine Act. This provision provides:

(b) Attorney's obligation

It shall be the ethical obligation of any attorney

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[4] This would be consistent with Congress' greater goal of discouraging civil litigation against vaccine manufacturers. *See infra* at 9.

> who is consulted by an individual with respect to a vaccine related injury or death to advise such individual that compensation may be available under the program for such injury or death.

42 U.S.C. § 300aa-10(b). This ethical disclosure requirement promotes the reaching of an informed choice with respect to the utilization of available Vaccine Act procedures so that jurisdictional missteps - such as those of Petitioners - will be averted.

Upon review and analysis, the import and application of the text of § 11(a)(6) to the instant situation is apparent when considered independently and in conjunction with the statute as a whole.

Finally, Petitioners assert that the motivation behind inclusion of § 11(a)(6) was to preclude "double recovery" - implying that the statute's plain language should be bypassed and the legislative history consulted. However, Petitioners have failed to set forth any legislative history supporting a departure from the statute's plain language. *See Massing*, 926 F.2d at 1133.

Contrary to Petitioners' assertion, the legislative history illustrates that a major, and perhaps the primary, Congressional concern was to discourage civil actions against manufacturers in an effort to ensure a continued vaccine supply. H.R. Rep No. 908, 99th Cong., 2d Sess. 12-13 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6344, 6353-54; National Childhood Vaccine Injury Act of 1985: Hearing on S. 827 Before the Senate Committee on Labor and Human Resources, 99th Cong., 1st Sess. 20, (1985). In keeping with this goal, the legislative history contemplates a choice between filing a civil suit and a Vaccine Act petition and the

accompanying risk of being barred outright from the Vaccine Act compensation system. The text of House of Representative Committee on Energy and Commerce's House Report 99-908, largely mimicking § ll(a)(6), indicates that if a person injured within eight years prior to the date of the Act " . . . initiates a civil action against a manufacturer after the enactment of this legislation without first completing the compensation system, he or she may not enter the compensation system." H.R. Rep. No. 908, 99th Cong., 2d Sess. 14 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6355 (emphasis added). Thus, an examination of the legislative history reveals a Congressional intent to bar petitions initiated subsequent to civil actions such as the one brought by Petitioner Willie Fred Brown.

Conclusion

Upon review it is determined that the drafters of the Vaccine Act did not construct a system in which every single petitioner injured as a result of a pre-November 15, 1988 vaccination would be eligible for compensation. Petitioners fall squarely within the purview of § 11(a)(6) and therefore cannot obtain jurisdiction under the National Vaccine Compensation Program. As the special master correctly decided this matter, it is accordingly **ORDERED** that Petitioners' motion for review is **DENIED** and judgment shall be so entered. No costs.

James F. Merow
Judge

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

96-5068

WILLIE F. BROWN and DORIS N. BROWN,
as parents of SARAH J. BROWN,
Petitioners - Appellants,

v.

SECRETARY OF
HEALTH AND HUMAN SERVICES,

Respondent - Appellee.

DECIDED: June 12, 1996

Before ARCHER, *Chief Judge*, CLEVENGER, and RADER, *Circuit Judges*. ARCHER, *Chief Judge*.

Willie and Doris Brown appeal from the judgment of the Court of Federal Claims affirming the Special Master's dismissal of their, petition for compensation under the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. §§ 300aa-1 to -34 (1994) (Vaccine Act), for an injury suffered by their daughter. *Brown v. Secretary of Dep't of Health & Human Servs.*, 34 Fed. Cl. 663 (1995). *We affirm.*

DISCUSSION

Appellants filed a petition for compensation under the Vaccine Act alleging that their daughter, Sarah, suffered an injury by reason of a diphtheria-pertussis-tetanus (DPT) vaccination. The Special Master dismissed their petition because the Browns had filed a civil action for damages after November 15, 1988, and were thus barred by § 300aa - 11 (a)(6) from pursuing a petition under the Vaccine Act. Finding no error of law or abuse of discretion, the Court of Federal Claims affirmed.

We review *de novo* the decision of the Court of Federal Claims as to whether the special master's decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Knudsen v. Secretary of the Dep't of Health & Human Servs.*, 35 F.3d 543, 546 (Fed. Cir.1994); *Hines v. Secretary of the Dep'tof Health & Human Servs.*, 940 F 2d 1518, 1524 (Fed. Cir. 1991).

Section 11 (a)(6) of the Vaccine Act provides:

> If a person brings a civil action after November 15, 1988 for damages for a vaccine-related injury or death associated with the administration of a vaccine before November 15, 1988, such person may not file a petition under subsection (b) of this section for such injury or death.

Under this section, a civil suit for an injury resulting from a vaccination administered before November 15, 1988, which is filed after that date, constitutes an, election and precludes the filing of a claim under the Vaccine Act. *See, e.g., Salceda v. Secretary of Health & Human Servs.*, 70 F.3d 608, 609 (Fed.

Cir. 1995).

The pertinent facts of this case are not in dispute. Sarah received the DPT vaccination that the Browns allege caused her injuries in February, 1986. The Browns initiated a civil action on January 17, 1989 by sending a letter to the Louisiana Commissioner of Insurance and then filing suit on May 25, 1990 in a Louisiana state court against the physician who administered the vaccination. Thus, the Browns' claim falls squarely within § 11(a)(6) - the Browns filed a civil action after November 15, 1988, for injuries associated with a vaccination administered before November 15, 1988 - and, as a result, the Browns may not file a petition under the Vaccine Act. Accordingly, the Special Master did not err by dismissing the Browns' petition and the judgment of the Court of Federal Claims is affirmed.

The Browns argue that, because they dismissed the civil suit on, September 30, 1990, they have complied with § 11 (a)(5)(A)[1] and should be allowed to file a petition under the Vaccine Act. This section is not applicable, however, because the Browns did not have a civil action pending on the effective date of that subpart, October 1, 1988, as required by that section.

Section 11 (5)(A) provides:

> A plaintiff who on October 1, 1988, has pending a civil action for damages for a vaccine-related injury or death may, at any time within 2 years after October 1, 1988, or before judgment, whichever occurs first, petition to have such action dismissed without prejudice or costs and file a petition under subsection (b) of this section for such injury or death.

42 U.S.C. § 300aa-(11)(5)(A) (1994).

Supreme Court, U.S.
FILED

961821 SEP 9 1996

OFFICE OF THE CLERK

No. _____

In

The Supreme Court of the United States

October Term, 1995

Willie F. Brown and Doris N. Brown,
parents of Sarah J. Brown,

Petitioners-Appellants

V.

Secretary of Health and Human Services,

Respondents

On Petition for Writ of Certiorari
To The United States Court Of Appeals
For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

Willie F. and Doris Brown
422 Evangeline Circle
Alexandria, LA 71302
(318)443-2171

10 pp

QUESTIONS PRESENTED

1. Why should our child be denied help under USC 300aa11(6)(a)?

2. Why doesn't the court feel we fall under USC 300aa11(5)(a)?

3. Why didn't the Court inform us in ample time instead of waiting approximately five (5) years now that we have no other avenue to take?

4. Why was our case reviewed three (3) times (each time asking for additional information) before the decision of Special Master Elizabeth Wright?

5. Why didn't the Secretary of the Department of Health properly inform the public under USC 300aa(10)(c)?

6. Why wasn't the attorney knowledgeable of USC 300aa(10)(b)?

7. Why should our daughter who is severely mentally retarded have such a difficult time having this petition granted?

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APPENDIX A

APPLICATION NO. _____

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States court of appeals at Appendix A to the petition is has been designated for publication but is not yet reported.

JURISDICTION

The date on which the United States Court of Appeals decided my case was June 12, 1996.

An extension of time to file the petition for a writ of certiorari was granted to and including November 12, 1996 on November 12, 1996 in Application No. A- _____.

STATEMENT OF THE CASE

We are being denied on 300aa 11(6)(a) - stating if a person brings a civil action after November 15, 1988 for damages for a vaccine-related injury or death associated with the administration of a vaccine before November 15, 1988, such person may not file a petition under subsection (b) of this section for such injury or death. This law did not go into effect until December 19, 1989. We had filed a suit with the State of Louisiana on 1-17-89 before this date. When Congress was in session to change this law how would the public know what they are going to change it to. I feel we fall under 300aa 11(5)(a).

Is it irrelevant that it took five years to make a decision that we did not qualify for the National Vaccine Injury Compensation? Because of 300aa 11(6)(a) I disagree. Our case was reviewed three (3) times before the decision of Special Master Elizabeth Wright was made on June 30, 1995. The case was reviewed on 12/8/93, 3/10/94 and 11/18/94 asking for additional information. I feel that there is some negligence on the court and I do not want to say who is at fault.

I would like to point out that 300aa (10)(c) that the Secretary of the Department of Health shall undertake reasonable efforts to inform the public of the availability of the program. The only publicity that I saw was on television during the month of September, 1990 and you had until October 1, 1990 to get a claim in. I feel that this was unfair.

Also, 300aa (10)(b). The attorney should have informed us of the National Vaccine Injury Compensation Program. I agree when we approach a local attorney he forward the information to an attorney out of town because he was unfamiliar with it. But if the court was in my position when you have a child that has been injured by the vaccine that require total

attention it is hard to keep up with the current laws. The main concern is trying to get your child well. When you are in and out of the doctors office and hospital and working full time there is very little time to do anything. We did not qualify for any assistance to help defray the medical cost so both parents had to work.

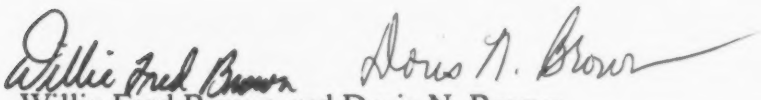
REASONS FOR GRANTING THE PETITION

My child is severely mentally retarded and we still cannot get any help. I want to keep my child at home and not in an institution. I am appealing to The Supreme Court for some justice and understanding.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Willie Fred Brown and Doris N. Brown

March 6, 1997

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

96-5068

Willie F. Brown and Doris N. Brown,
as parents of Sarah J. Brown,

Petitioners-Appellee.

V.

Secretary of

Health And Human Services,

Respondent-Appellee.

DECIDED: June 12, 1996

Before Archer, Chief Judge, Clevenger, and Rader, Circuit Judges. Archer, Chief Judge.

Willie and Doris Brown appeal from the judgment of the Court of Federal Claims affirming the Special Master's dismissal of their petition for compensation under the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. 300aa-1 to -34 (1994) (Vaccine Act), for an injury suffered by their daughter. Brown v. Secretary of Dept. of Health and Human Servs., 34 Fed. Cl. 663(1995). We affirm.

DISCUSSION

Appellants filed a petition for compensation under the Vaccine Act alleging that their daughter, Sarah, suffered an injury by reason of a diphtheria-pertussis-tetanus (DPT) vaccination. The Special Master dismissed their petition because the Browns had filed a civil action for damages after November 15, 1988, and were thus barred by 300 aa-ll(a)(6) from pursuing a petition under the Vaccine Act. Find no error of law or abuse of discretion, the Court of Federal Claims affirmed.

We review do novo the decision of the Court of Federal Claims as to whether the special master's decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Knudsen v. Secretary of the Dep't of Health & Human Servs., 35 F.3d 543, 546(Fed. Cir. 1994); Hines v Secretary of the Dep't of Health & Human Servs., 940 F.2d 1518, 1524(Fed. Cir. 1991).

Section 11(a)(6) of the Vaccine Act Provides:

> If a person brings a civil action after November 15, 1988 for damages for a vaccinerelated injury or death associated with the administration of a vaccine before November 15, 1988, such person may not file under subsection (b) of this section for such injury or death.

Under this section, a civil suit for an injury resulting from a vaccination administered before November 15, 1988, which is filed after that date, constitutes an election and precludes the filing of a claim under the Vaccine Act., See, e.g., Salceda v. Secretary of Health & Human Servs., 70 F.3d 608, 609(fed. Cir. 1995).

The pertinent facts of this case are not in dispute. Sarah received the DPT vaccination that the Browns allege caused her injuries in February, 1986. The Browns initiated a civil action on January 17, 1989 by sending a letter to the Louisiana Commissioner of Insurance and then filing suit on May 25, 1990 in a Louisiana state court against the physician who administered the vaccination. Thus, the Browns' claim falls squarely within ll(a)(6)-the Browns filed a civil action after November 15, 1988, for injuries associated with a vaccination administered before November 15, 1988 - and, as a result, the Browns may not file a petition under the Vaccine Act. Accordingly, the Special Master did not err by dismissing the Browns' petition and the judgment of the Court of Federal Claims is affirmed.

The Browns argue that, because they dismissed the civil suit on September 30 1990, they have complied with 11(a)(5)(A).[1] and should be allowed to file a petition under the Vaccine Act. This section is applicable, however, because the Browns did not have a civil action pending on the effective date of that subpart, October 1, 1988, as required by that section.

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1. Section 11(5)(A) provides:

A plaintiff who on October 1, 1988, has pending a civil action for damages for a vaccine-related injury or death may, at any time within 2 years after October 1, 1988, or before judgment, whichever occurs first, petition to have such action dismissed with prejudice or costs and file a petition under subsection (b) of this section for such injury or death.

42 U.S.C.
300aa(11)(5)(A)(1994)

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